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No. 711

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

FORSTER MFG. CO., INC., *a Corporation,*

and

THEODORE R. HODGKINS, *Petitioners,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY TO MEMORANDUM FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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Petitioner's Response To Opposition

Admitting, as it must, that the findings which are the basis of its order were made by 2 of its 5 commissioners, the Federal Trade Commission seeks to avoid review of this jurisdictional defect by claiming Petitioner waived its right to raise lack of jurisdiction by "failure timely to raise the point." (Opposition p. 4)

The Commission's reliance upon *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 is misplaced. For there this Court held that an irregularity in an examiner's appointment "is not one which deprives the Commission of power or jurisdiction, so that even in the absence of timely objection its order should be set aside as a nullity."

The Court in so ruling did not hold that a challenge to jurisdiction is only appropriate if made before the Inter-

state Commerce Commission before appeal to the Courts. See *Manual Enterprise* v. *Day*, 370 U.S. 478, 499, N.5.

This Court stated the principle applicable here in *United States* v. *Corrick*, 298 U.S. 435, 440:

> "The appellants *did not raise the question of jurisdiction at the hearing below. But the lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties,* and the district court should, therefore, have declined *sua sponte*, to proceed in the cause. And if the record discloses that the lower court was without jurisdiction, this Court will notice the defect, although the parties make no contention concerning it. While the District Court lacked jurisdiction we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." (Emphasis added)

Attempted action by the Federal Trade Commission outside of its statutory enabling power is void for lack of jurisdiction and such action must be set aside when raised in any court at any time. Cf. *Whitney Nat. Bank* v. *Bank of New Orleans*, 379 U.S. 411, 414.

A fundamental distinction is crystal clear between the failure of the Commission to muster at least the vote of three of its five members as required by its enabling legislation and due process as opposed to a mere irregularity in the appointment of a hearing examiner. The Cease and Desist Order entered by the Commission in this case was beyond its jurisdiction when made by the Commission and the Commission's order must be set aside as void.

An administrative agency of government, such as the Federal Trade Commission, has only such power as is pro-

vided by statute. *F.T.C.* v. *Sinclair Refining Co.*, 261 U.S. 463, 475.

Congress delegated power to a Five Member Federal Trade Commission who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the commissioners shall be members of the same political party. Federal Trade Commission Act. 15 U.S.C. §41.

The Court of Appeals For the Ninth Circuit has said that "* * * an order of the Commission must be supported by three members in order to constitute an enforceable order of the FTC. Two of five is too few." *Flotill Products, Inc.* v. *F.T.C.*, 358 F. 2d 224, 230 (9th Cir. 1966), affirmed, *per curiam, en banc* August 15, 1966, 1966 Trade Cases §71.871, Petition for Cert. pending, No. 668, This Term. That Court added that it was "* * * difficult to believe that Congress conceived of the five-member FTC with its politically balanced make-up permitting two of its members to speak for the Commission, and failed to specifically provide enabling legislation." .Id. at 229, as amended.

The Federal Trade Commission admits that the question presented in this case i.e. whether an opinion and findings by two of five FTC Commissioners constitutes a decision of the Commission, "may involve the jurisdiction of the agency." (Opposition p. 4)

Indeed the Commission itself is now seeking review of the identical jurisdictional question Petitioner's raise in *Federal Trade Commission* v. *Flotill Products, Inc.*, No. 668, This Term, and has not opposed review of the question in *Purolator Products Inc.* v. *Federal Trade Commission*, No. 61 This Term, review of which is also pending.

Conclusion

It is respectfully submitted that the Commission is wrong as a matter of law in its contention that Petitioner did waive, or could waive, the Commission's lack of jurisdiction by "failure timely to raise the point" and that this Court should review and reverse the void order of the Commission herein.

Respectfully submitted,

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